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OCTOBER TERM, 1989

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC. and ASSOCIATION OF INTERNATIONAL AUTOMOBILE MANUFACTURERS, INC.,

Petitioners,

vs.

ROBERT ABRAMS, Attorney General of the State of New York,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

I. THE CONFLICT AMONG THE CIRCUITS

Surprisingly, Respondent claims (Opp. 11-14) there is no conflict among the Circuits. Yet the Court of Appeals noted otherwise: "there is conflicting authority" among the Circuits on the federal preemption issue presented in our petition. Pet.App. 10-11. Acknowledging the split among the Courts of Appeal, the opinion below rejected the Fourth Circuit's analysis and adopted what it expressly recognized as the contrary position of the Eighth Circuit: "[W]e find the result reached by the Eighth Circuit in *Automobile Importers [of America, Inc. v. Minnesota,* 871 F.2d 717 (8th Cir.), *cert. denied,* 110 S.Ct. 201

(1989)] more persuasive than that of the Fourth Circuit in *Wolf* [*v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987)]." Pet.App. 11.

The conflicting rulings of the Fourth and Fifth Circuits cannot be disregarded. *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192, 1206 (5th Cir. 1985) makes a clear and explicit distinction between *state-run* warranty dispute resolution programs, which Magnuson-Moss does not preempt, and *private* dispute resolution mechanisms, which are preempted because "the preclusive effect of section 110 [15 U.S.C. § 2310] is limited to rules governing informal dispute resolution procedures created by private warrantors[.]"

Respondent's attempt to reconcile *Wolf* with the proposition that the Circuits are not in disagreement is untenable. Respondent fails to note (Opp. 13) that the state law at issue in *Wolf* was being invoked specifically "to determine, under the guise of a fraud claim, whether the Ford Consumer Appeals Board has complied with FTC Rule 703." 829 F.2d at 1278 (quoting District Court opinion). The question disposed of in *Wolf* — whether state law can regulate the procedures followed by private dispute mechanisms established pursuant to Magnuson-Moss and its implementing regulations — is the same issue presented in this case. The Fourth Circuit in *Wolf* (like the Fifth Circuit in *Chrysler Corp.*) ruled that the federal law impliedly preempts such state regulation:

> . . . Congress has not explictly preempted any state laws affecting private dispute settlement boards. Congress' intent to preempt state regulation, however, can be inferred both from the pervasive nature of the federal regulatory scheme and from the conflict that would result if Wolf's fraud claim were allowed.

829 F.2d at 1279.

Respondent's contention (Opp. 13) that the Fourth Circuit did not consider the language or legislative history of

Magnuson-Moss is belied by *Wolf's* extensive discussion of the statute and its purpose: ensuring against individual state regulation of private Rule 703 dispute mechanisms, which unless preempted would "frustrate completely the goal of national uniformity painstakingly designed by federal statute and regulation." 829 F.2d at 1280.

As the Second Circuit noted, a conflict among the Circuits on this important preemption issue is simply undeniable.[1]

II. THE SAVINGS CLAUSE AND THE STATUTE'S "MINIMUM" REQUIREMENTS

Respondent asserts that the decision below is correct because Magnuson-Moss has a "broad savings clause" and only directs the FTC to prescribe "minimum" rules, implying that supplemental state regulation does not frustrate the purposes of the federal statute. Opp. 5-6.

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[1] Respondent attempts to create the impression that other courts have unanimously agreed that Magnuson-Moss or Rule 703 preempt state laws of the type at issue in this case. Opp. 13, n.13. With one exception, however, the cited authorities do not even discuss whether Magnuson-Moss preempts contrary state regulation of informal dispute resolution mechanisms. Even *General Motors Corp. v. Abrams*, 897 F.2d 34 (2d Cir. 1990) expressly states that its analysis of the preemptive effect of a consent judgment has no relevance to the issue presented in our Petition. *Id.* at 42 n.8.

Contrary to Respondent's suggestion, courts have not held that Magnuson-Moss permits state regulation of all of its provisions. *E.g., In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1128 n.33 (7th Cir.) (Magnuson-Moss "provides its own mechanism for protecting the general public's interest in enforcement of its provisions. It does not leave protection of the public interest up to the Attorneys General of the fifty states"), *cert. denied*, 444 U.S. 870 (1979).

The only other authority cited by Respondent that actually supports his position is unreported. *Chrysler Corp. v. Armstrong*, No. 85-345 slip op. (E.D. Ky. Apr. 30, 1985) is unpersuasive because it relies heavily on an informal staff opinion that is not the official position of the FTC. Resp. App. 6 n.1. Regardless, *Armstrong* is clearly at odds with the contrary rulings of the Fourth and Fifth Circuits.

These arguments proceed from a fundamental confusion between the dispute mechanism provisions of Magnuson-Moss and the other aspects of the statute regarding *substantive* remedies and damages for breaches of warranty. The Magnuson-Moss savings clause makes clear that states may legislate in the area of substantive warranty remedies. But remedies for warranty violations are for purposes of a preemption analysis conceptually distinct from the issue of Magnuson-Moss private resolution mechanisms.[3]

This latter aspect of Magnuson-Moss — a totally new field not traditionally a subject of state regulation — does not contemplate or permit state law. The type of generalized savings clause found in Magnuson-Moss, 15 U.S.C. § 2311(b)(1), preserves then-existing state and common law remedies but does

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[3] Past lower court decisions — including those relied upon by Respondent — have consistently drawn this distinction between state substantive remedies for breaches of warranty, and state laws that purport to regulate those aspects of Magnuson-Moss that Congress has chosen to regulate and which therefore are preempted. *E.g., Matter of State v. Ford Motor Co.*, 133 Misc.2d 828, 510 N.Y.S.2d 425, 432 (Sup. 1986) ("The Magnuson-Moss Act does not preempt, or prevent the enactment of, any *state law providing a remedy to a consumer, but does prohibit any other form of state law* that would regulate the contents, or performance under, a written warranty complying with the requirements of the Magnuson-Moss Act") (emphasis in original), *modified on other grounds*, 136 A.D.2d 154 (3d Dept. 1988), *aff'd* 74 N.Y.2d 495 (1989).

This distinction also finds support in the statutory language. When Congress elected not to preempt "any right or remedy . . . under state law," 15 U.S.C. § 2311(b)(1), the legislature also defined "remedy" in terms of *substantive* measures of damages or relief. 15 U.S.C. § 2301(10). The definition of "remedy" in Magnuson-Moss is further evidence that the savings clause is intended only to preserve such substantive rights. The preservation of "remedies" does not authorize states to legislate in the separate area of dispute mechanisms, where (unlike in the case of substantive warranty law) there was in 1975 no history of state regulation and no existing Lemon Laws or other statutes purporting to govern.

not immunize from federal preemption later-enacted state statutes that conflict with the matters upon which Congress has chosen to legislate. *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987).

The suggestion that the Magnuson-Moss authorization for promulgation of "minimum" standards necessarily denotes authority for the *states* (rather than *warrantors*) to decide what procedures above the "minimum" for Rule 703 mechanisms should be adopted is insupportable. Congress and the FTC expressly intended that additional mechanism procedures that exceed the "minimum" would be determined by warrantors responding to consumer demand and market forces, and not by the fiat of 50 individual states. FTC Statement of Basis and Purpose, 43 Fed. Reg. 60168, 60193 (Dec. 31, 1975).[3]

Respondent carefully excludes from his description of the state-federal consistencies the Lemon Law's requirement of binding arbitration. Opp. 9. This omission is significant because this aspect of the state law expressly violates a Magnuson-Moss provision *prohibiting* such binding arbitration. Contrary to Respondent's suggestion, the Second Circuit specifically found that this contradiction can only be resolved if warrantors elect "not to set up a [Rule 703] mechanism in New York[.]" Pet.App. 13. The fundamental conflict between the state and federal laws could not be more clear.

III. THE PENDING FTC PETITION

Respondent claims (Opp. 11-12) that the Court should not review the decision below because a petition to amend Rule 703

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[3] Congressional decisions to create nationwide regulatory schemes characterized by flexibility, balancing of competing interests and market competition must be respected. States cannot frustrate these policies by dictating the choices Congress wanted the marketplace to determine. *E.g., Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986).

is pending before the FTC. No authority is cited for this proposition. In fact, there are sound reasons why the writ should issue regardless of any speculation regarding possible agency action.

Petitioners do not seek judicial review of an administrative decision or question the legal standard of such review — issues that might call for deference to agency expertise. Rather, the Court is asked to review constitutional issues wrongly determined contrary to rulings by other Circuits. This Court, not the FTC, is the sole forum to resolve the constitutional issues presented. *Califano v. Sanders,* 430 U.S. 99, 109 (1977); *St. Francis Hosp. Ctr. v. Heckler,* 714 F.2d 872, 873 (7th Cir. 1983) *cert. denied,* 465 U.S. 1022 (1984) ("Deference to administrative expertise does not extend to judging the constitutionality of a statute or regulatory scheme").

In addition, the prospect of an FTC decision is at best speculative. There is no way to know whether the FTC will act at all, much less whether it will preempt state law.

Finally, the FTC's approach to the issue before it focuses on a cost-benefit analysis to determine whether states should regulate dispute settlement mechanisms. *See* 54 Fed. Reg. 21071 (May 16, 1989) (asking "[w]hether the costs of non-uniformity in the laws governing the resolution of warranty disputes outweigh the benefits of such non-uniformity"). It is difficult to anticipate how a cost-benefit analysis will determine questions based on the Supremacy Clause.

IV. CONCLUSION

The Petition for Writ of Certiorari should be granted.

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